

NOTICE
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2014 IL App (5th) 130318-U

NO. 5-13-0318

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> COMMITMENT OF EDWARD S. ABEL)	Appeal from the
)	Circuit Court of
(The People of the State of Illinois,)	Wayne County.
)	
Petitioner-Appellee,)	
)	
v.)	No. 11-CF-92
)	
Edward S. Abel,)	Honorable
)	Joe Harrison,
Respondent-Appellant).)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Welch and Justice Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* Respondent did not receive ineffective assistance of trial counsel who did not request appointment of independent psychiatrist or introduce a 2008 evaluation of respondent under a different statute.

¶ 2 This appeal concerns a judgment of the circuit court of Wayne County declaring respondent, Edward S. Abel, a sexually dangerous person pursuant to the Illinois Sexually Dangerous Persons Act and committing him to the custody of the director of the Department of Corrections (725 ILCS 205/0.01 *et seq.* (West 2012)). The two issues respondent raises on appeal argue ineffective assistance of counsel.

¶ 3 Respondent first claims he received ineffective assistance of counsel as a result of counsel's failure to request the court to appoint an independent psychiatrist based on bias that existed when Dr. Angeline Stanislaus conducted her evaluation of respondent and prepared her report opining respondent was a sexually dangerous person. Respondent secondly claims he received ineffective assistance of counsel as a result of counsel's failure to present a 2008 evaluation of respondent that determined there was not sufficient data to conclude respondent suffered from a mental disorder that would make it more probable he would engage in acts of sexual violence.

¶ 4 We disagree with respondent's assertion that he received ineffective assistance of counsel. For the following reasons, we affirm the judgment of the circuit court of Wayne County.

¶ 5 **BACKGROUND**

¶ 6 In May 2011 respondent was charged by indictment with aggravated criminal sexual abuse after he allegedly fondled a girl under the age of 13 (720 ILCS 5/11-1.60(d) (West 2012)). On September 9, 2011, the Wayne County State's Attorney's office filed a petition to declare respondent a sexually dangerous person pursuant to the Sexually Dangerous Persons Act (725 ILCS 205/0.01 *et seq.* (West 2012)). The petition alleged respondent had been previously convicted of two counts of aggravated criminal sexual abuse in 2006 and one count of aggravated criminal sexual abuse in 2010 (725 ILCS 205/0.01 *et seq.* (West 2012)). The petition also alleged respondent suffered from a mental disorder and had criminal propensities to commit sex offenses and acts of sexual molestation of children.

¶ 7 A bench trial took place on December 3, 2012. The trial court appointed Dr. Stanislaus and Dr. Jagannathan Srinivasaraghavan as qualified psychiatrists to conduct a personal examination of respondent to determine whether he qualified as a sexually dangerous person pursuant to the Sexually Dangerous Persons Act.

¶ 8 Dr. Stanislaus was the first of the two witnesses called by the State. Counsel for respondent objected to Dr. Stanislaus's qualification as an expert on the basis that she had a contractual relationship with the Department of Corrections, specifically with the sexually dangerous persons unit at Big Muddy River Correctional Center, at the time she produced her report recommending respondent be declared a sexually dangerous person and confined in the sexually dangerous persons unit at Big Muddy River Correctional Center.

¶ 9 The trial court overruled respondent's counsel's objection after it concluded Dr. Stanislaus was "an expert in the field of medicine and all of its practices in forensic psychology, sex offender evaluation, and risk assessment." Dr. Stanislaus then testified on the sources of information she referred to when preparing to conduct her evaluation of respondent. Dr. Stanislaus testified she referred to respondent's psychiatric history, social history, substance abuse history, and medical history. She testified that these materials are reasonably relied on by experts in the field when evaluating sex offenders.

¶ 10 Dr. Stanislaus's records indicated respondent had been arrested or accused of several incidents of grabbing or groping females in public stores such as Wal-Mart or the Dollar General Store. These incidents included:

- A 2003 arrest in Olney for groping an adult woman's buttocks in the Dollar General Store.
- A 2004 Richland County complaint alleging respondent groped a 14-year-old female's buttocks in a Wal-Mart.
- A 2006 incident in which respondent was accused of grabbing a 17-year-old female's buttocks in the Fairfield Wal-Mart.
- A 2006 incident in which respondent was accused of groping a female's buttocks in the Flora Wal-Mart.
- A 2010 incident in which respondent was accused of groping an 11-year-old female's buttocks in the Flora Wal-Mart.

¶ 11 After conducting an interview with respondent that lasted approximately 1½ hours, Dr. Stanislaus opined to a reasonable degree of psychiatric certainty that respondent was a sexually dangerous person.

¶ 12 Dr. Srinivasaraghavan also testified at trial as an expert in the field of evaluating and treating sex offenders. Dr. Srinivasaraghavan evaluated respondent in February 2012 and listed the sources of information he referenced when preparing his evaluation. This information included police reports, court documents, and previous evaluations, specifically a sexually violent person evaluation completed by Dr. Barry Leavitt.

¶ 13 In addition to his evaluation of respondent, Dr. Srinivasaraghavan also conducted a clinical interview with respondent that lasted approximately two hours. After considering his interview and evaluation of respondent, Dr. Srinivasaraghavan prepared a report opining respondent was a sexually dangerous person. Dr. Srinivasaraghavan

concluded respondent exhibited a propensity to commit sex offenses and possessed propensities to sexually molest children as indicated by his three prior convictions of aggravated criminal sexual abuse of girls under the age of 13.

¶ 14 On December 4, 2012, after hearing closing arguments, the trial court determined respondent to be a sexually dangerous person and committed him to the custody of the Department of Corrections.

¶ 15 On December 21, 2012, respondent filed a *pro se* notice of appeal directly with this court, which was then forwarded to the circuit clerk of Wayne County. Respondent's *pro se* appeal was dismissed, and respondent's trial counsel subsequently made an oral motion for new trial. Respondent's oral motion was denied on June 26, 2013, and trial counsel filed a new notice of appeal on behalf of respondent with the circuit clerk of Wayne County on June 27, 2013.

¶ 16 ANALYSIS

¶ 17 On appeal, respondent first alleges trial counsel was ineffective for failing to request the court to appoint an "independent psychiatrist" based on alleged bias of Dr. Stanislaus.

¶ 18 A claim of ineffective assistance of counsel is evaluated by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). The two prongs of the test consist of (1) deficiency and (2) prejudice. Specifically, in order to obtain relief under *Strickland*, the defendant must both show (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; see *People v. Albanese*, 104 Ill. 2d 504 (1984).

¶ 19 To satisfy the deficiency prong of *Strickland*, the defendant must prove that counsel made errors so serious and counsel's assistance was so deficient that counsel was not functioning at the level guaranteed by the sixth amendment. *People v. Easley*, 192 Ill. 2d 307, 317, 736 N.E.2d 975, 985 (2000). Counsel's performance is measured by an objective standard of competence under prevailing professional norms. *Easley*, 192 Ill. 2d at 317, 736 N.E.2d at 985. To establish deficiency, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy (*People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999)), as there is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

¶ 20 To meet the second prong of *Strickland*, the defendant must establish prejudice. The defendant must prove that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1164. A reasonable probability is a probability sufficient to undermine confidence in the result. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1164.

¶ 21 The prejudice prong of *Strickland* entails more than an outcome-determinative test, as the defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1164 (citing *People v. Griffin*, 178 Ill. 2d 65, 74, 687 N.E.2d 820, 827 (1997)). A defendant does not need to prove he would have been acquitted, as "prejudice

may be found even when the chance that minimally competent counsel would have won an acquittal is significantly less than 50 percent." (Internal quotation marks omitted.) *People v. McCarter*, 385 Ill. App. 3d 919, 935, 897 N.E.2d 265, 281 (2008).

¶ 22 A defendant must satisfy both prongs of the *Strickland* test. Because a defendant must establish deficiency in counsel's performance and prejudice resulting from the alleged deficiency, " 'failure to establish either proposition will be fatal to the claim.' " *Easley*, 192 Ill. 2d at 318, 736 N.E.2d at 985 (quoting *People v. Sanchez*, 169 Ill. 2d 472, 487, 662 N.E.2d 1199, 1208 (1996)).

¶ 23 In the instant case, the State tendered Dr. Stanislaus as an expert. After opining to a reasonable degree of psychiatric certainty that respondent was a sexually dangerous person, respondent's counsel cross-examined Dr. Stanislaus. During cross-examination, Dr. Stanislaus testified that from 2004 to 2012 she obtained half of her income from a contract with Wexford, which in turn contracted with Department of Corrections, to provide psychiatric services to sexually dangerous persons incarcerated at Big Muddy River Correctional Center.

¶ 24 Respondent's counsel argued:

"[W]e have a report that was prepared while [Dr. Stanislaus] has an interest with a government entity. [Dr. Stanislaus] testified that at the time, around 40 to 50% of her practice was devoted to practice with the Department of Corrections, specifically, sexually dangerous persons unit. She also testified that at around the same time, roughly, the income she derived from her total practice was about the same percentage. And we would—we would submit to the Court that this is not an

appropriate relationship for somebody who's going to be rendering an opinion under the sexually dangerous persons statute, because the—if this Court finds that he is an [sexually dangerous person], he's going to be committed to the very unit that [Dr. Stanislaus] had a contractual [*sic*] relationship with at the time of the evaluation."

¶ 25 Respondent alleges trial counsel would have filed a motion to remove Dr. Stanislaus well in advance of trial, rather than counsel's objection to Dr. Stanislaus's qualifications at trial, due to Dr. Stanislaus's purported bias if trial counsel had been operating with a reasonable level of professional competence. Respondent also asserts trial counsel's failure to previously object to Dr. Stanislaus performing the evaluation, preparing the report, or being called as a witness amounts to ineffective assistance of counsel. We disagree.

¶ 26 The Illinois Supreme Court has addressed a similar argument in *People v. Burns*, 209 Ill. 2d 551, 809 N.E.2d 107 (2004). *Burns* involved a respondent who applied for discharge from involuntary commitment as a sexually dangerous person under the Sexually Dangerous Persons Act and moved for an independent psychiatric exam. In his motion for an independent psychiatric examination, the respondent alleged the psychiatrist assigned to his case, who was employed by the Department of Corrections, would not be able to give him an independent examination because the psychiatrist was an employee of the state and would, therefore, comply with the Department of Corrections' desire to find the respondent still qualified as a sexually dangerous person.

¶ 27 *Burns* determined that Department of Corrections professionals who are employed by the institution where the respondent is confined are not presumed biased or prejudiced. The *Burns* court also determined independent psychiatric experts are not presumed to always testify contrary to the Department of Corrections professionals or always testify in favor of discharge. The court stated:

"Department professionals who treat sexually dangerous persons such as respondent are untainted by their employment given the nature of their professional and fiduciary relationship with their patients. In addition, the Department professionals treating respondent are most knowledgeable about respondent's problems and progress toward recovery, and are in the best position to know if respondent has recovered." *Burns*, 209 Ill. 2d at 567-68, 809 N.E.2d at 118.

¶ 28 The State in *Burns* relied on *People v. Capoldi*, 37 Ill. 2d 11, 225 N.E.2d 634 (1967). The court in *Capoldi* denied the defendant's request for an independent psychiatrist after determining there was no provision in the Sexually Dangerous Persons Act "entitling him to the services of an independent psychiatrist and we do not believe that such services are necessary to protect defendant's rights." *Capoldi*, 37 Ill. 2d at 18, 225 N.E.2d at 638.

¶ 29 In the instant case, respondent's claim that counsel should have filed a motion to remove Dr. Stanislaus in advance of trial is mistaken. Respondent indicates if one "can demonstrate that she or he was prejudiced by such appointment, that defendant should not

be precluded from bringing a motion to substitute the court-appointed psychiatrist." *People v. McVeay*, 302 Ill. App. 3d 960, 964-65, 706 N.E.2d 539, 543 (1999).

¶ 30 However, respondent fails to prove he was prejudiced by counsel's failure to file a motion to remove Dr. Stanislaus in advance of trial. As discussed above, Department of Corrections professionals who are employed by the institution where the respondent is confined cannot be presumed biased or prejudiced.

¶ 31 The record reveals no indication that Dr. Stanislaus was biased or prejudiced in this case, or that a different "independent psychiatrist" would have reached a different conclusion than Dr. Stanislaus. Respondent does not show that but for counsel's failure to file a motion to remove Dr. Stanislaus, the result of the proceeding would have been different. The record also indicates the court considered respondent's claim of bias but were not convinced. For these reasons, respondent's claim of ineffective assistance of counsel cannot succeed under *Strickland*.

¶ 32 The second issue raised by respondent on appeal alleges trial counsel was ineffective for failing to present evidence of a 2008 evaluation of respondent which determined there was not sufficient data to conclude respondent suffered from a mental disorder that would make it more probable he would engage in acts of sexual violence. Respondent also alleges counsel was ineffective for failing to call Dr. Reidda as a witness and/or failing to question Dr. Srinivasaraghavan regarding Dr. Leavitt's opinion contained in the 2008 evaluation of respondent during the bench trial.

¶ 33 The State contends respondent's claim of ineffective assistance of counsel arising out of counsel's failure to introduce a 2008 evaluation may not be raised on direct appeal

and is meritless because it was not before the trial court. Alternatively, the State contends counsel's decision to not introduce the 2008 evaluation or call Dr. Reidda or Dr. Srinivasaraghavan to testify in court was reasonable trial strategy and did not prejudice respondent.

¶ 34 Dr. Barry Leavitt evaluated respondent pursuant to the Sexually Violent Persons Commitment Act evaluation checklist on February 18, 2008 (725 ILCS 207/1 *et seq.* (West 2012)). Dr. Leavitt did not recommend respondent for civil commitment after concluding respondent did not suffer from a mental disorder that made it probable he would engage in acts of sexual violence. Dr. Reidda, the director of the sexually violent persons evaluation unit for Affiliated Psychologists, Ltd., forwarded this evaluation to the Wayne County State's Attorney's office. Respondent asserts his trial counsel was ineffective for failing to call Dr. Reidda to the stand during the bench trial and for failing to question Dr. Srinivasaraghavan concerning Dr. Leavitt's opinion in the 2008 evaluation of respondent.

¶ 35 Decisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432, 719 N.E.2d 664, 673 (1999). To establish counsel as ineffective, the defendant must overcome the strong presumption that the challenged action or inaction might have been the result of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. This means the defendant must prove that counsel's errors were so serious, and his performance so inadequate, that he did not function as the counsel guaranteed by the

sixth amendment. *People v. Perry*, 224 Ill. 2d 312, 342, 864 N.E.2d 196, 214-15 (2007). In addition, the defendant must also prove there is a reasonable probability the result of the proceeding would have been different without counsel's errors. *Perry*, 224 Ill. 2d at 342, 864 N.E.2d at 215. The State asserts respondent has not overcome this presumption. We agree.

¶ 36 As the State indicates, while the trial court knew the 2008 evaluation existed, it was never presented with the document itself or informed of the conclusions it contained. Also, the 2008 evaluation respondent indicates was completed pursuant to the Sexually Violent Persons Commitment Act (725 ILCS 207/1 *et seq.* (West 2012)), which is distinguished from the Sexually Dangerous Persons Act used in this case to determine whether or not respondent met the criteria to be labeled a sexually dangerous person (725 ILCS 205/0.01 *et seq.* (West 2012)). Importantly, respondent does not allege counsel was unaware of the 2008 evaluation of respondent. With that said, counsel's decision to not introduce the 2008 evaluation and not call Dr. Reidda to the stand or question Dr. Srinivasaraghavan about the 2008 evaluation cannot be considered anything but a tactical choice made by counsel on the basis of strategic considerations.

¶ 37 The tactical choice in the instant case is similar to the tactical choice made by counsel in *People v. Whittaker*, 199 Ill. App. 3d 621, 629, 557 N.E.2d 468, 472 (1990), in which the court found the defendant failed to overcome the presumption that trial counsel's decision to not call certain witnesses was anything but a tactical choice. In *Whittaker*, the court found the defendant failed to show anything in the record to indicate

other reasons for counsel's decision to not call certain witnesses to the stand after determining counsel was informed of the witnesses' testimony prior to trial.

¶ 38 The court in *Whittaker* cited to *People v. Consago*, 170 Ill. App. 3d 982, 524 N.E.2d 989 (1988), which involved a similar argument as the one made in the instant case. In *Consago*, the defendant claimed he received ineffective assistance of counsel because counsel failed to call an eyewitness to a shooting. The eyewitness had provided counsel with a sworn statement of his testimony prior to trial and counsel had initially listed him as a potential witness.

¶ 39 Regardless of the eyewitness testimony's prospective importance, the court in *Consago* stated: "even if it were [important], the requirements as set forth in *Strickland* are extremely stringent and the defendant here must overcome the strong presumption of effective assistance of counsel and the general proposition that failure to secure testimony is generally regarded as a matter of trial strategy." *Consago*, 170 Ill. App. 3d at 988, 524 N.E.2d at 993.

¶ 40 As a general proposition, decisions regarding which witnesses to call or what evidence to present are matters of trial strategy that are immune from claims of ineffective assistance of counsel. Noting that counsel was informed of the eyewitness's testimony prior to trial and had even listed him as a potential witness, the court in *Consago* found the defendant had failed to overcome the strong presumption of effective assistance of counsel and the assertion that counsel's decision to not call a particular witness was a matter of strategy.

¶ 41 Similarly, respondent in the instant case does not indicate counsel was not informed of the 2008 evaluation prior to the bench trial. Accordingly, counsel's decision to not present the 2008 evaluation and not call Dr. Reidda to the stand or question Dr. Srinivasaraghavan about the 2008 evaluation of respondent can be only deemed a tactical decision, not ineffective assistance of counsel.

¶ 42 Respondent argues the 2008 evaluation that determined he did not suffer from a mental disorder that made it probable he would engage in acts of sexual violence was favorable evidence, and that his counsel's decision to ignore that favorable evidence was not a reasonable strategy. Respondent indicates courts have repeatedly found that counsel has not acted reasonably when he has failed to capitalize on favorable evidence. *People v. Hobson*, 2014 IL App (1st) 110585, 7 N.E.3d 786. In *Hobson*, the court found counsel did not act reasonably when he failed to impeach state witnesses with details of leniency given in exchange for testimony.

¶ 43 However, unlike *Hobson*, the record from the instant case reveals several incidents that have occurred between the time respondent's evaluation was completed in 2008 and the bench trial commenced in 2012. In 2008, respondent was released on mandatory supervised release, but violated the conditions of mandatory supervised release 72 days later and was sentenced back to the Department of Corrections until October 2009. Six months after his release, respondent was charged with aggravated battery and aggravated criminal sexual abuse in Clay County after a surveillance video captured him groping the buttocks of an underage girl and an adult female in a Wal-Mart. 720 ILCS 5/12-3.05, 12-

16(d) (West 2010). Respondent pled guilty to both counts and was sentenced to eight years' imprisonment.

¶ 44 Also, while he was in prison for aggravated battery and aggravated criminal sexual abuse, respondent was accused of fondling his ex-wife's 10-year-old granddaughter's vagina and buttocks sometime between October 2009 and March 2010. In May 2011, respondent was indicted by a Wayne County grand jury on a charge of aggravated criminal sexual assault arising from this incident (720 ILCS 5/11-1.30 (West 2012)).

¶ 45 It is reasonable to conclude that counsel did not introduce the 2008 evaluation of respondent because respondent went on to commit criminal sexual offenses between the time the 2008 evaluation was completed and the time the bench trial commenced. It is also reasonable to assume trial counsel believed the 2008 evaluation had limited probative value, as these offenses most certainly would invalidate the 2008 evaluation that determined respondent did not suffer from a mental disorder that made it probable he would engage in acts of sexual violence.

¶ 46 Furthermore, it is reasonable to assume trial counsel believed the 2008 evaluation had limited probative value because it was completed pursuant to the Sexually Violent Persons Commitment Act rather than the Sexually Dangerous Persons Act that was utilized by the court in this case to determine respondent a sexually dangerous person. For these reasons, counsel's decision to not introduce the 2008 evaluation of respondent cannot be considered ineffective assistance of trial counsel.

¶ 47

CONCLUSION

¶ 48 For the reasons stated herein, we affirm the judgment of the circuit court of Wayne County, Illinois.

¶ 49 Affirmed.